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Alice R. Benally and Belinda Benally v. L. G. Robinson, Clifford G. Edmunds and Louis W. Duncan : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

ALICE R. BENALLY and PERLINDA BENALLY, by her guardian ad litem, ALICE R. BENALLY,
Plaintiffs - Appellants,
v.
L. G. ROBINSON, CLIFFORD G. EDMUNDS and LOUIS W. DUNCAN,
Defendants - Respondents.

Case No. 9677

APPELLANTS' BRIEF

Appeal from the Judgments of the
District Court of Salt Lake County
Hon. Merrill C. Faux & Ray Van Cott, Jr.

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STATEMENT OF THE KIND OF CASE

This is an action brought by the surviving wife and daughter to recover damages for the wrongful death of their husband and father caused by the defendants who are Salt Lake City Police Officers.

DISPOSITION IN LOWER COURT

The court at the pretrial of the case granted a motion for a summary judgment in favor of the defendants, Clifford G. Edmunds and Louis W. Duncan. As to the defendant, L. G. Robinson, the case was tried to a jury. From the summary judgment that was entered in favor of the defendants,

Clifford G. Edmunds and Louis W. Duncan, and from a verdict and judgment in favor of the defendant, L. G. Robinson, plaintiffs appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the summary judgment in favor of the defendants, Clifford G. Edmunds and Louis W. Duncan, and reversal of the judgment in favor of the defendant, L. G. Robinson, and that plaintiffs be granted a new trial as to all of the defendants.

STATEMENT OF FACTS

Defendants are Salt Lake City Police Officers. Thomas Dee Benally, the decedent, was a Navajo Indian and was 22 years of age at the time of his death. Alice R. Benally is the wife of the decedent and Perlinda Benally is the minor daughter.

On November 26, 1960, the defendant, Clifford G. Edmunds, was on duty in the Salt Lake City Jail as Chief Jailer. The defendant, Louis W. Duncan, was on duty as the Assistant Jailer. On the same day the defendant, L. G. Robinson, was on duty and was running the patrol wagon which is commonly called the "paddy wagon". Robinson has been employed as a police officer since 1946.

On November 26, 1960, Robinson saw Benally in downtown Salt Lake for the first time at about 6:30 P.M. (R. 107) Sometime later on the same

evening Robinson again observed Benally in a drunken condition. Benally was immediately placed under arrest. At the time of the arrest, Benally had blood on his face and his coat was on upside down. Benally was placed in the paddy wagon and taken to the City jail. Robinson helped Benally out of the wagon because he felt that for a man in Benally's condition it would be dangerous to let him try and get out of the wagon himself. (R. 112) Robinson got behind the decedent and took him up the steps to the entrance of the jail. (See Exhibit 1.) While standing there pushing the door bell to be admitted by the jailer, Benally lurched backward and both Robinson and Benally fell completely to the ground with Benally landing on top of Robinson. Robinson then got up and again took Benally up the stairs, the door was opened and they entered the reception room. From there Robinson and Benally were admitted to the "booking area" of the jail.

Robinson proceeded to search Benally and give his belongings to the jailer. There was no particular difficulty with this until Robinson attempted to reach in the watch pocket of Benally for the purpose of removing its contents. Benally seemed to object to this part of the searching procedure. As a result, Robinson took Benally's hands in his and placed them on the wire screen on the west side of the booking area and by using his body he pushed Benally

against the wire screen and held him in that position. When he again attempted to get the contents of the watch pocket, Benally dropped to the floor on his hands and knees and attempted to get hold of Robinson's leg. Robinson then swung his left leg over Benally and stood astraddle of him. He was then able to remove the $10.00 bill from Benally's watch pocket. (R. 156-157) As to what occurred from here on, the evidence is in conflict. Robinson testified that he released Benally after removing the $10.00 bill. That he watched Benally out of the corner of his eye. As Benally got to his feet he started moving backwards very fast in a northeasterly direction until he hit the wire mesh door that was hooked open, and this seemed to propel him to the left down the stairs where Benally went head over heels and landed on the cement floor on his back. (R. 161-163)

An inmate and a jail trusty, James Day, testified that Robinson had a stick in his hand that was approximately 1 foot long and ¾ of an inch in diameter and that while he was astraddle Benally that he had Benally's head between his legs and hit him on the head two or three times with the stick. That Benally tried to pull away from Robinson and in so doing did get free and that he backed across the booking area into the wire door that was open at the head of the stairs and this seemed to

turn him to the left and he fell down the stairs. James Day also testified that prior to the time that Benally fell down the stairs he heard Edmunds, the Chief Jailer, say to Robinson that he wasn't going to accept anybody that was beat up. Day testified that Robinson made no answer to this remark. (R. 305-311)

Another inmate, Thomas L. Casteel, testified that approximately thirty minutes prior to the time Benally was brought in the jail, that he had been booked on a charge of being a federal probation violator. Casteel and Day were inside the cell block door and Benally and Robinson were in the booking area. (See Exhibit 6.) There is an opening in the cell block door that is about 12" x 15". It has no glass in it but does have some bars across it. Casteel and Day were approximately twenty feet from Robinson and were looking through the window in the cell block door. (R. 200-202) Casteel observed that Benally was very drunk and that when Robinson first brought him into the booking area that Robinson had a club in his hand that was about 1½ inches to 2 inches in diameter. That Benally had difficulty standing so Robinson laid the club on the counter and then used both hands trying to keep Benally up. At this point Casteel turned away from the window in the cell block door while James Day stood there still watching what was going on in the booking

area. Casteel then heard Edmunds say, "*Robinson, if you don't quit beating these guys up I am going to quit taking them*". Following this the only comment made by Robinson was an angry, "God damn son-of-a-bitch". (R. 230-232) About ten to twenty seconds later Casteel testified that he heard scuffling and heard something hit a door as if it were bouncing against a concrete wall or a brick wall and at that point James Day turned to Casteel and said, "*Robinson has knocked him down the steps*". (R. 233)

Robinson and another officer who had just entered the jail after Benally's fall, brought Benally upstairs to the booking area. They carried him through the cell block door and back into the cell block where they, according to Casteel, "Pitched him forward onto the floor". (R. 237) Benally was left on the floor in an unconscious condition.

It was not until the late afternoon of the next day, November 27, 1960, that Benally was taken to the Salt Lake County Hospital. He was in the hospital from that time until November 30, 1960, when he died as a result of the head and brain injuries that he received from the fall down the stairs. (R. 123-134)

At the head of the stairway down which Benally fell, there is a heavy wire mesh door that is equipped with a spring designed to keep the door

closed at all times except when in actual use for ingress or egress. Captain E. J. Steinfeldt, who was acting Chief of Police at the time of trial, testified that in 1956 or 1957 the stairway was changed because it was dangerous. A number of prisoners who were intoxicated had fallen down the stairs and for that reason the heavy wire mesh door was placed at the head of the stairs with the spring on it to keep it closed at all times except when in actual use. (R. 185-187) Steinfeldt testified that it was common knowledge among the officers on the police force that the changes made in the booking area and the installation of the gate at the head of the stairs was for safety reasons. (R. 192) He further testified that it was the arresting officer's duty to keep the prisoner under control at all times during the booking and until the prisoner was locked in his cell. (R. 196)

At the time Robinson entered the booking area with Benally the wire door at the head of the stairs was open and was held open by a wire hook. All Robinson would have had to do when he entered the booking area was turn his eyes to the left and he would have observed the door open, but this he didn't do. (R. 183) During his career as a police officer, Robinson had booked many a drunk person. He knew that the booking area was a small, restricted area. (R. 180-181) Robinson did not close

the door during the booking of Benally nor did he close it prior to the time he released Benally.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE CASE TO THE JURY ON THE THEORY OF NEGLIGENCE.

POINT II

THE COURT ERRED IN ADMITTING, OVER OBJECTION, THE TESTIMONY OF THE DEFENDANT, LOUIS W. DUNCAN, THAT HAD PREVIOUSLY BEEN GIVEN AT THE CORONER'S INQUEST.

POINT III

THE COURT ERRED IN GIVING INSTRUCTIONS NO. 21, 22 AND 23.

POINT I

THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE CASE TO THE JURY ON THE THEORY OF NEGLIGENCE.

From the very beginning plaintiffs have asserted liability against the defendants on three differen theories:

1. That the defendant, L. G. Robinson, willfully threw Benally down the stairs.

2. That the defendant, L. G. Robinson, used an unreasonable amount of force in booking Benally and this resulted in Benally being propelled down the stairs.

3. That the defendants were negligent in that,

a. Clifford G. Edmunds and Louis W. Duncan failed to close the door at the head of the stairs or take such other precautions as might be necessary to prevent Benally from injuring himself.

b. L. G. Robinson should have either closed the door at the head of the stairs before releasing Benally in the booking area or, considering Benally's condition and all of the other circumstances, he should have kept Benally under control or taken other precautions so as to prevent him from falling down the stairs and injuring himself.

These theories of liability have been asserted from the inception of this case. See the complaint (R. 1), plaintiffs' answers to interrogatories submitted by defendant, Louis W. Duncan (R. 15), plaintiffs' answers to interrogatories submitted by defendant, Clifford G. Edmunds (R. 17), contentions of plaintiffs served on all parties prior to the pretrial (R. 21), plaintiffs' requested Instruction No. 7 (R. 35), plaintiffs' exceptions to instructions as given by the court (R. 418-419) and the memorandum of authorities presented to the court prior to trial.

The court by its Instructions 20, 21, 22, 23 and 24 submitted the case to the jury on the theory that the defendant, Robinson, was liable only if Benally's fall down the stairs was caused by Robinson deliberately throwing him down the stairs or by

Robinson using excessive and unreasonable force. Judge Faux refused to instruct the jury that Robinson would be liable if he was guilty of only negligence that caused Benally's fall and resulting death. (See plaintiffs' requested Instruction No. 7 (R. 35) and the court's notation thereon "not given" and requested Instruction No. 1 (R. 38) and the court's notation thereon "given in substance, element of negligence omitted".) Judge Van Cott by granting the motion for summary judgment of Edmunds and Duncan in effect held that there could be no liability on their part for their negligence in failing to close the door at the head of the stairs or in failing to take other precautions to prevent the decedent from injuring himself.

The fundamental issue involved in this appeal is whether or not a police officer is liable for injury or death of a prisoner that is proximately caused by the police officer's negligence or is a police officer liable only for injury or death of a prisoner if it results from a willful wrongful act of the officer or from the use of unreasonable and excessive force. It is plaintiffs' position that a police officer is liable for negligence that results in injury or death to a prisoner. And this is true whether the negligence be called a "misfeasance" or a "nonfeasance".

Exhibit 6 is a diagram of the City Jail. Exhibit 1 is a photograph showing the steps and the

entrance to the jail. Exhibit 3 is a photogroph that is taken just inside the front door of the jail and shows the wire mesh wall and door that leads into the booking area. This photograph also shows the wire door that is at the head of the stairs in question. It should be noted that the diagram of the jail, Exhibit 6, shows a heavy dark wall between the reception room and the booking area. From looking at that exhibit it might be thought that the wall is a solid wall. This is not true. The wall is a wire mesh wall and a wire mesh door as is shown by Exhibit 3. It should be noted that the distance from the door at the head of the stairs to the wire wall that separates the reception room from the head of the stairs is 3' 10". The distance from the west side of the stairs to the booking window is only 3' 2½". The overall distance from the east side of the stairs to the other side or west side of the booking area is only 6' 8". The booking area as will be seen from the diagram, Exhibit 6, is small and restricted. This fact Robinson well knew and admitted knowing. (R. 180) All of the defendants as did all of the other officers on the force knew that the door was placed at the head of the stairs for safety reasons because several persons particularly those who were intoxicated had fallen down the stairs. Captain E. J. Steinfeldt, the officer in charge of the jail, testi-

fied that the door was installed in 1956 or 1957. In addition, he testified as follows at p. 185:

> "Q. It was during that year then that you say that you put this heavy wire door at the head of the stairs, the stairs that Benally went down?
>
> "A. Correct.
>
> "Q. And you put it up there for what reason?
>
> "A. A safety measure.
>
> "Q. And why did you feel that it should be there for safety purposes?
>
> "A. Well ordinarily an individual just not knowing the stairway was there would fall down it."

Captain Steinfeldt testified that prior to the installation of this door, a number of people, particularly those who were intoxicated, had fallen down the stairs and that this was the reason for the change. (R. 187) Steinfeldt further testified on p. 192,

> "Q. Now Chief one more question here. When you made all of these changes in the booking area and put this gate in at the head of the stairs, was this pretty much common knowledge among the officers on the force at that time?
>
> "A. Yes.
>
> "Q. And in particular to those who would have been using the jail?
>
> "A. Yes.

"Q. And was it pretty much common knowledge among your officers as to why you were doing it?

"A. Yes.

"Q. And that common knowledge was that it was for safety purposes?

A. Correct."

At the time of the accident the defendant, Edmunds, was the senior officer and was in charge of the jail. (R. 192)

An arresting officer is responsible for his prisoner during the booking and until the prisoner is placed in his cell. (R. 190) If the arresting officer needs help with the prisoner, he should request assistance from the jailer. (R. 190) Robinson had no difficulty handling Benally and he at no time requested Edmunds or Duncan to assist him. (R. 159-160) Robinson knew Benally was drunk. At p. 170 the following question was asked and answer was given.

"Q. (By Mr. Crellin) You testified that by a classification of drunk, slightly drunk or very drunk that you would classify Mr. Benally as having been very drunk is that correct?

"A. Correct."

At p. 122 the following questions were asked and answers given.

"Q. Now when you got out of the wagon

at the police station, what did you do then, Mr. Robinson?

"A. Helped him from the wagon over to the steps and up the steps.

"Q. Now you say you helped him out of the wagon?

"A. I did.

"Q. And what was the reason for helping him out?

"A. Well there is quite a step from the wagon down to the ground and a man in his condition would be dangerous to let him make the step by himself.

"Q. And how far would this step be, I mean in feet from the getting out of the wagon down to the ground?

A. I'd say possibly two feet."

Robinson knew that Benally had lurched against him when they were about to enter the jail and had caused both of them to fall to the ground. In again classifying his condition Robinson said he was to a staggering and mumbling point but still mobile. (R. 171) Robinson knew he had difficulty with Benally after he got in the booking area in searching him. When Benally was arrested his jacket was on upside down and he had blood on his face. (R. 109)

All of the defendants knew or should have known that the door at the head of the stairs was open. They all knew that it was placed there for

safety reasons, that the booking area was small and restricted and that there was a great likelihood that if a person in an intoxicated condition was in the booking area that that person, if the door was open, would fall down the stairs.

Certainly Duncan and Edmunds knew or should have known that with the door that had been placed there for safety purposes, open, a dangerous condition existed and in particular a dangerous situation existed for a prisoner who was intoxicated. Assuming that Robinson had no duty at all with respect to the closing of the door inasmuch as Edmunds and Duncan, being the jailers, were in charge of the jail, prior to the time that Robinson released Benally, still it must be kept in mind that Robinson knew the door was there, knew why it was there, knew the condition of Benally and if he was not required prior to releasing Benally, to affirmatively shut the door, certainly he should be required before he released Benally to either shut the door or if he did not do that he should keep Benally under such control that Benally in his then condition could not fall down the stairs and injure himself.

As seen from the foregoing there is ample evidence from which a jury could find that Duncan and Edmunds were negligent for leaving the door at the head of the stairs open and that Robinson was negligent when he released Benally in the book-

ing area without first closing the door or taking other precautions to prevent Benally from falling down the stairs. The question is whether under the law of this state a police officer is liable for injury or death of a prisoner that results from the police officer's negligence as distinguished from his willful or intentional wrongful acts or his excessive use of force.

The Utah Supreme Court in the case of *Lowry v. Carbon County, et al,* 64 U. 555, 232 P. 908 (1924), has held that a public official in the performance of his duty is liable for injury or death of another caused by the negligent acts of the public official. In that case the county commissioners were personally engaged in building a road through Helper. They carelessly set a charge of dynamite to blast some rock. This rock hit the decedent and resulted in his death. The court in the Lowry case cites the Massachusetts case of *Moynihan* v. *Todd,* 188 Mass. 301, 74 N.E. 367, and by dicta seems to adopt the rule that public officials are liable for a misfeasance but are not liable for a nonfeasance. Again it should be observed that this is only dicta. The narrow holding of the Lowry case is that a public official is liable for his negligent acts.

In the first place there can be no merit to the distinction between a nonfeasance and a misfeasance. If there is a duty to act and a failure that

results in injury or death, the resulting damage is the same whether the harm resulted from a negligent act or a failure to act in the face of a duty to act. We respectfully urge this court to ignore the dicta in the Lowry case and to adopt a rule predicating liability on the theory of negligence whether the negligence be a so called "misfeasance" or a "nonfeasance". Many states have adopted such a rule and have made no distinction in determining the liability of a police officer for injury or death of a prisoner.

Hayes v. *Billings*, 240 N.C. 78, 81 S.E. 2d 150, involved a case where the plaintiff's son suffered from a nervous breakdown making him oblivious to danger. The sheriff arrested the boy and put him in jail. The parents notified the sheriff of the boy's condition and requested the sheriff to keep him in in a place of safety. The sheriff permitted the boy to roam in an upstairs hallway of the jail where there was an open space into which he fell to his death. The sheriff in this case failed to take measures to keep the boy in a safe place. The court held the sheriff was liable for such failure.

The case of *Justice* v. *Rose*, 102 Ohio App. 482, 144 N.E. 2d 303, adopts the majority rule that a sheriff or other officer must exercise reasonable and ordinary care to insure the preservation of life and the health of a prisoner. The court observes

that the statute imposing a duty on the sheriff to keep prisoners safely is merely declaratory of the common law which imposes that duty on the sheriff and requires him to exercise reasonable care and diligence to protect a prisoner from a danger that is known to him or which might be reasonably anticipated by him. The court says liability of the sheriff is predicated on negligence.

Smith v. *Miller*, 241 Ia. 625, 40 N.W. 2d 597, 14 A.L.R. 2d 345 (1950), involved an action to recover damages for wrongful death of a prisoner that died in the county jail. He was the only prisoner. No guards were kept in the jail. He was visited by officers only at times necessary to feed him. He had no means of communication with the people outside except by shouting. No one in the immediate vicinity of the jail had a key or means of evacuating prisoners in an emergency. The decedent died from suffocation when the jail filled with smoke from a burning mattress, which was presumably ignited by a cigarette. The lower court entered a judgment for the defendant and the Supreme Court reversed. The court in reversing quoted from *Odell* v. *Goodsell*, 149 Neb. 261, 30 N.W. 2d 906, where the prisoner suffocated in the jail by a burning mattress and the Supreme Court of Nebraska held it was error for the trial court to direct a verdict for the sheriff. The Nebraska court said,

"We think it was error for the trial court to refuse to submit to a jury the failure of the sheriff to provide a guard for the jail in its described condition and the proper inferences to be drawn from such failure. We also think it was error for the court to refuse to submit to a jury the question of the adequacy of ventilation under the circumstances and the failure to make outside communication available and the proper inferences to be drawn from the circumstances.

"We think that the question of whether the sheriff under the circumstances failed to respond to his duty to the plaintiff's decedent in light of the potential danger of which he knew or in the ordinary exercise of his facilities for observation and understanding should have known, was a question for determination by a jury."

Clark v. *Kelly*, 101 W. Va. 650, 133 S.E. 365, 46 A.L.R. 799, involved an action against the sheriff for damages for injury when a jail flooded. In holding that the sheriff was liable for failure to take precautions to prevent the flooding of the jail the court said,

"We will not undertake to review all the decisions cited by counsel for the proposition many times affirmed, that a public officer is liable to anyone injured by the nonperformance or negligent performance of his ministerial duties, and this without regard to his motives and without reference to any question of corruption; and whether he has discharged these imposed duties is generally a question of fact for the jury."

The annotation in 14 A.L.R. 2d 345 entitled "Civil Liability of Sheriff or Other Officer Charged with Keeping Jail or a Prison for Death or Injury of Prisoner", states the rule as follows,

> "The majority of courts hold that the sheriff or other officer, owes a duty to the prisoner to keep him safely and to protect him from unnecessary harm and it has also been held that the officer must exercise reasonable and ordinary care for the life and health of the prisoner."

In support of this rule our own case of *Richardson* v. *Capwell*, 63 U. 616, 176 P. 205, is cited. The Utah case involved an action against the town marshal and the justice of the peace. Insofar as it affected the town marshal, the plaintiff claimed damages on the ground that during the time that he was in prison he was given insufficient nourishment, was exposed to the cold and was put in an unsanitary and filthy jail. The trial court failed to give any instructions to the effect that the plaintiff could recover damages resulting from the failure to maintain the jail in proper condition. The Utah Supreme Court reversed as to this phase of the case and in so doing said,

> * * * "It does appear that the defendant, Jenkins, as town marshal was the keeper of the town jail and was supposed to furnish food for the prisoners as well as to keep the building warm and sanitary. If plaintiff desires, he is entitled to have the question as to

damages, if any, he may have sustained in these particulars, submitted to the jury; * * *"

The annotation in 60 A.L.R. 2d 873 entitled "Personal Liability of Policeman, Sheriff or Other Peace Officer or Bond for Negligently Causing Personal Injury or Death" cites the general rule to the effect that a peace officer, as a general rule, is personally liable for negligent or wrongful acts causing personal injury or death. The annotation then defines negligence as follows:

> "Negligent conduct may be either (a) an act which the actor as a reasonable man should realize as involving an unreasonable risk or causing an invasion of an interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do."

In 80 C.J.S., Sec. 117, p. 326, the rule is stated,

> "A sheriff owes a duty to a prisoner in his custody to keep him in health and free from harm. He must exercise ordinary and reasonable care under the circumstances to preserve the life, health and safety of a prisoner in his care and custody, * * *"

In 72 C.J.S., Sec. 13, p. 866, the rule is stated,

> "A jail official has a duty to use reasonable care to prevent injuries to a prisoner by his fellow prisoners."

Hunt v. *Rowton*, 143 Okla. 181, 288 P. 342, involved a suit against a sheriff for negligence in

the sheriff failing to isolate a prisoner that was suffering from small pox from the rest of the prisoners. The deceased contacted the disease and died. The court held the sheriff was liable and affirmed the judgment in favor of the plaintiff on the ground that the sheriff was negligent in failing to isolate the prisoner who was infected with a contagious disease.

We submit that no distinction should be made between a misfeasance and a nonfeasance, and that the Utah Court should ignore the dicta in the Lowry case and predicate liability of a police officer on the theory of negligence whether the negligence be for action or nonaction. In the event such a distinction is made it is our position that as to the defendant, Robinson, his negligence is definitely a misfeasance. He has control of the decedent and he affirmatively releases the decedent in a place of danger knowing that the decedent is likely to injure himself by reason of his intoxicated condition and by reason of the fact that the door at the head of the stairs is open. Even under the rule announced by the Lowry case, Robinson's negligent *act* of releasing the decedent in a place of danger would be sufficient on which to predicate liability.

The Supreme Court of Kansas in *Bukaty* v. *Berglund*, 179 Ka. 259, 294 P. 2d 228 (1956), reversed the lower court's dismissal of an action

against a sheriff that was grounded on the theory that to recover from a police officer there had to be a showing of willfulness or malice or bad faith. The Supreme Court after reviewing a number of cases rejected that rule and held that a sheriff or other person having another in custody is liable for injuries or death caused by his negligence.

The defendants in this case will undoubtedly cite *Roe* v. *Lundstrom*, 89 U. 520, 57 P. 2d 1128, for the proposition that a police officer is not liable unless a showing of malice or bad faith on the part of an officer is shown. The Roe case is definitely not authority for this proposition but merely holds that an officer who commits a trespass in the enforcement of an invalid ordinance is civilly liable for that trespass. The statements in the case that indicate that "willful negligence, malice, or corruption constituting misfeasance" are necessary before an officer is liable, are dicta and we again urge this court to ignore the dicta of the Roe case and Lowry case and announce a rule that is in accord with the later decisions of other states that have dealt with the problem; namely, that a peace officer is liable for injury or death that result from his negligence and that is true whether the negligence be a misfeasance or a nonfeasance.

Thomas v. *Williams*, 124 S.E. 2d 409, (Ga. 1962), was an action to recover damages for a

wrongful death. In that case the chief of police arrested the decedent for drunk driving and disorderly conduct and put him in a cell in a partially unconscious and helpless condition. The decedent had matches and a lighted cigarette in his possession. Defendant thereafter left the jail without leaving anyone in attendance and defendant failed to take the matches and lighted cigarette from decedent. While defendant was gone a mattress caught fire in the cell and the decedent suffocated. The officer returned while the mattress was burning and instead of immediately getting the decedent out of the cell, he got a hose and turned the water on the mattress which the plaintiff claims increased the smoke and the danger to the prisoner.

The trial court dismissed the complaint and on appeal the appellate court reversed and in so doing announced the general rule that an officer having custody of a prisoner, has a duty to exercise ordinary care to keep his prisoner safe and free from harm. The court then discusses the affect of the prisoner being drunk and in so doing says,

> "The law is that a person is charged with knowledge that a man staggering drunk is incapable of exercising ordinary care for his own safety, and he is bound to deal with him with that fact in mind. *Bennett Drug Stores* v. *Moseley*, 67 Ga. App. 347, 20 S.E. 2d 208.

The present petition alleges that the officer

had knowledge of the prisoner's helpless condition. If this be true, the officer in performing his duty to exercise ordinary diligence to keep the prisoner safe and free from harm, was bound to deal with him with his condition in mind."

"In the performance of his duty to exercise ordinary diligence to keep his prisoner safe and free from harm, an officer having custody of a prisoner, when he has knowledge of facts from which it might be concluded that the prisoner may harm himself or others unless preclusive measures are taken, must use reasonable care to prevent such harm. In some circumstances reasonable care may require the officer to act affirmatively to fulfill this duty."

The court then goes on to say,

"The present petition presents these questions which must be decided by the jury:

"Was the officer negligent in leaving the prisoner incarcerated in a close cell and unattended, with a lighted cigarette and matches on his person, when he knew the prisoner was partially unconscious and helpless?

"Should the officer, under the circumstances, in the exercise of his duty to keep the prisoner safe and free from harm, have immediately rescued the prisoner upon becoming aware of the fire in the cell?

"Was the officer negligent in pumping water on the burning mattress in the prisoner's cell, in that he should, in the exercise of ordinary care, have anticipated that this would increase the danger of the prisoner?"

Muniz v. *United States*, Docket No. 26841, 2nd Cir. N.Y. decided February 27, 1962. (The case is not reported at this time.) This case involved a suit by a Federal prisoner who was allegedly beaten into insensibility and partial blindness by fellow inmates. The court held that a cause of action was stated alleging negligence in supervision of the prisoners that resulted in injury to the plaintiff.

The court in this case held that the exception barring claims "arising out of assault" did not apply in this case. The exception applies only to assault by government agents, not to assaults by third persons *which the government negligently fails to prevent.* (Emphasis ours)

Applying the rules of the foregoing cases to the case at bar, the evidence clearly shows that all of the defendants were negligent. All of the defendants knew the door at the head of the stairs was placed there for safety purposes, that prisoners and particularly intoxicated ones had fallen down the stairs prior to the installation of the wire door, that the door was equipped with a spring to keep it shut unless it was affirmatively opened and hooked to the wall, that Benally was in a "very drunk" condition, that he was uncooperative during the booking procedure, that the booking area was small, restricted and a dangerous place when the door was open. Robinson knew that the decedent had blood

on his face and his coat was upside down at the time of the arrest, that he was very drunk and that he was incapable of getting out of the patrol wagon alone without danger to himself, that he lurched outside the jail causing both himself and Robinson to fall to the ground, that he was very uncooperative during the search procedure. Under these circumstances it is difficult to see what other conclusion could be drawn than Edmunds and Duncan should have anticipated that a person in Benally's condition could very well injure himself by falling down the stairs unless they closed the door at the head of the stairs or unless they took other precautions to prevent Benally from injuring himself. As far as Robinson is concerned knowing the condition of the booking area, the condition of Benally and knowing the reason for putting the door at the head of the stairs, it is inconceivable that Robinson would release Benally in the booking area, a place of danger, without either first closing the door at the head of the stairs or taking other precautions to see that Benally did not injure himself by falling down the stairs.

This court is again urged to disregard completely the dicta statement of the Lowry and Roe cases and to clearly declare the rule of this state to be that an officer is liable for a failure to exercise ordinary care when that results in injury or

death to a prisoner and that this is so whether the failure to exercise ordinary care is a misfeasance or a nonfeasance. A life or a limb is as effectively gone whether caused by negligent action or negligent inaction. In reason the distinction between a so called misfeasance and a so called nonfeasance cannot be sustained.

POINT II

THE COURT ERRED IN ADMITTING, OVER OBJECTION, THE TESTIMONY OF THE DEFENDANT, LOUIS W. DUNCAN, THAT HAD PREVIOUSLY BEEN GIVEN AT THE CORONER'S INQUEST.

On December 6, 1960, there was a coroner's inquest held in Salt Lake City, Utah, on the death of Thomas Dee Benally. Louis W. Duncan, among other witnesses, was called and testified.

The day before the inquest plaintiffs' present counsel was called by a representative of the Navajo Tribe and was requested to attend the inquest and report to the Tribe the results. (R. 371) Without time to prepare and without knowing anything about the details of the case, the writer did appear at the inquest representing the Navajo Tribe and not the plaintiffs. The writer did question several of the witnesses including the defendant, Louis W. Duncan.

A few days prior to the trial of this case the defendant, Duncan, was injured and at the time of the trial was confined in a hospital and was unable to attend and testify.

At the inquest Thomas L. Casteel and James Day testified that prior to the time that Benally fell down the stairs they heard Edmunds say,

> "Robby if you don't quit beating up these guys I am going to quit taking them".

At the inquest Officer Duncan when asked about this statement of Edmunds said, that he did not hear such a statement and about all he did hear was Edmunds say something about he could not or would not take an injured prisoner and that this statement was made after Benally had fallen down the stairs.

After the coroner's inquest the special investigator employed by the City Commission, Mr. Arthur A. Allen, Jr., and a Mr. Gregory, a polygraph operator from Chicago, interviewed several of the officers involved including Officer Duncan. Mr. Gregory's report filed with the City Commission in referring to the interview with Officer Duncan states,

> "He said he is not positive, but is quite sure he recalls Edmunds saying to Robinson, if you don't stop beating these guys up I am not going to take them, and that this was said while Benally was still on the floor."

This statement was inconsistent with the testimony that Duncan had given at the coroner's inquest. It was plaintiffs' position at the trial of this case that Duncan's testimony given at the coroner's

inquest was not admissible and particularly is that true because plaintiffs would not be entitled to cross-examine Duncan relative to the later inconsistent statement that he made to the polygraph operator.

It is plaintiffs' position that although plaintiffs' attorney, Glenn C. Hanni, was present at the inquest and did in fact question Mr. Duncan, that he was not representing plaintiffs, that plaintiffs were not parties to the inquest and further that the inquest is not a judicial proceeding but is an inquisitorial proceeding for the sole purpose of determining whether or not any violation of the criminal laws has occurred and therefore since plaintiffs were not parties at the inquest and since the issues at the inquest are substantially different than the issues at the trial of this case, the testimony of Duncan should not have been admitted.

In 31 C.J.S., Sec. 385, p. 1191, the rule is stated,

> "Evidence given at a coroner's inquest is inadmissible except that such evidence has been held competent in some proceedings of a special nature, such as hearings before an industrial accident commission."

In *Pittsburgh Railroad Company* v. *McGrath*, 3 N.E. 439 (Ill. 1885) the court held that the testimony of a witness to a railroad accident, resulting in the death of a person injured, taken before a coroner's inquest upon the body of the deceased,

which witness had since died is inadmissible in an action by the representative by the deceased person against the railway company for the injury resulting in such death.

Bragdon v. *Northwestern Railroad Company*, 141 S.C. 238, 139 S.E. 459, involved an action to recover damages for a wrongful death. The appellate court in sustaining the exclusion of testimony received at a coroner's inquest said,

> "At the trial the defendant attempted to offer in evidence the testimony of Albert Wilson, the driver of the automobile, given at the coroner's inquisition over the dead body of Jemina Walker. The trial judge held this testimony incompetent and in this holding he was absolutely correct. If Wilson had been offered as a witness by the plaintiff, he could have been cross-examined as to this testimony before the coroner, and had he contradicted the statements there made by him, the defendant could have then offered his former testimony. We know of no rule, however, which would have permitted the defendant to introduce this statement as original testimony on its part."

Chesapeake & Ohio Railroad Company v. *McDonald*, 239 Ky. 258, 39 S.W. 2d 253 (1931). This was an action to recover damages for a wrongful death. The court in this case held that the testimony of a witness given at a coroner's inquest was not admissible and the Supreme Court on appeal affirmed. In so doing the court said,

"It is insisted that the court erred in refusing to allow the engineer's testimony, given before the coroner to be read before the jury. In *Kelly* v. *Connell*, 3 Dana 532, evidence given before arbitrators was held admissible (where the witness is dead) in a subsequent suit between the same parties. So in *O'Brien* v. *Com*, 6 Bush 563, the evidence of a witness on the examining trial was held competent on the final trial of the case where the witness was dead. In *North River Insurance Company* v. *Walker*, 161 Ky. 368, 170 S.W. 983, the testimony of a dead witness, upon the examining trial of the assured, was held competent in his suit against the insurance company. But none of these cases involved the competency of the testimony of a witness on a coroner's inquest. A coroner is not a judicial officer. The proceeding is inquisitorial. The examination and cross-examination of witnesses are matters of grace and not of right. The plaintiff was not a party to that proceeding. In Jones on Evidence, Sec. 339, the rule is thus stated: Nor is the testimony of a witness given at a coroner's inquest admissible under this exception in a subsequent action, as the inquest is not a judicial proceeding between the same parties."

Edgerly v. *Appleyard*, 110 Me. 337, 86 A. 244 (1913). The court in affirming the exclusion of the testimony of a witness given at a coroner's inquest said,

"The single question argued and presented in this case is whether the testimony of a witness given at a coroner's inquest upon the death of the plaintiffs intestate was admis-

sible in this action, when offered by the plaintiff, the witness having deceased after the inquest and before the trial. The trial court held it was inadmissible and the Supreme Court affirmed.

> "These proceedings are designed primarily to aid in the detection of crime. The inquest is ordinarily held immediately after the event has happened, and often times before the perpetrator is known or ever suspected. They are initiated by a public officer, there is no party defendant, and the county attorney, as the public prosecutor, usually elicits the evidence."

The court cleary committed prejudicial error in admitting, over objection, the testimony of Duncan given at the coroner's inquest. That is particularly true in view of the later statement made by Duncan to the polygraph operator that was inconsistent with his testimony at the coroner's inquest and concerning which plaintiffs were completely deprived of their right of cross-examination.

It may be argued that because plaintiffs' attorney was present at the inquest and did question Duncan that the testimony of Duncan should be admissible. This argument ignores several things; (1) plaintiffs' attorney was representing the Tribe only at the inquest; (2) plaintiffs were not parties to the inquest; (3) the inquest was not a judicial proceeding but is merely an inquisition; (4) the right of one other than the County Attorney to examine

witnesses is a matter of grace and not of right and this necessarily inhibits an attorney from cross-examining a witness to the extent he might if involved in a proceeding where his client was a party, where his client's substantial rights were involved and where he was examining as of right and not by grace; (5) the issues were not the same; (6) plaintiffs' attorney attended the inquest after being requested to do so only the day before and without a reason to prepare or adequate time to prepare or become acquainted with the facts. To hold that this afforded plaintiffs an adequate opportunity to cross-examine would be tantamount to holding that a person charged with crime was afforded counsel and a fair trial if his attorney was appointed only the day before the trial commenced and without time to prepare.

Plaintiffs were seriously prejudiced by permitting the use of Duncan's inquest testimony and for this reason the judgment as to Robinson should be reversed.

POINT III

THE COURT ERRED IN GIVING INSTRUCTIONS NO. 21, 22 AND 23.

Instruction No. 22 reads as follows,

> "You are instructed that if you find, by a preponderance of the evidence, that the plaintiffs' deceased husband and father fell down the stairs in the City Jail as a conse-

quence of his own voluntary acts and his intoxicated condition and that said fall proximately caused the injury or injuries which resulted in his death, you may not determine that said death was due to any breach of duty by defendant, Robinson."

In dealing with a claim of the defendant that because the deceased was voluntarily drunk there should be no liability for his death the court in *Thomas* v. *Williams*, 124 S.E. 2d 409, (Ga. 1962) said,

> "The prisoner may have been drunk voluntarily, but he was not in the cell voluntarily. The prisoner was not in the class of a trespasser at the place where he was injured.
>
> "The law is that a person is charged with knowledge that a man staggering drunk is incapable of exercising ordinary care for his own safety, and he is bound to deal with him with that fact in mind. *Bennett Drug Stores* v. *Moseley*, 67 Ga. App. 347, 20 S.E. 2d. 208. The present petition alleges that the officer had knowledge of the prisoner's helpless condition. If this be true, the officer in performing his duty to exercise ordinary diligence to keep the prisoner safe and free from harm, was bound to deal with him with his condition in mind."

Since an officer's duty is to exercise reasonable care to keep his prisoner safe and free from harm, the above instruction is clearly erroneous because the fact that Benally was "very drunk" and unable to take care of himself, was a circumstance

of which the defendants were well aware, and was a circumstance that the jury was entitled to consider in determining whether or not Robinson exercised that degree of care that an ordinary person would have exercised under the same or similar circumstances.

The court also instructed the jury in Instruction No. 23 as follows,

> "You are instructed that the defendant was under no duty to maintain the jail in a safe condition. Therefore, if you find from a preponderance of the evidence that the fatal injuries suffered by Thomas Dee Benally resulted from a fall down the stairs in the City Jail on the evening of November 26, 1960, and that said fall was proximately caused by reason of the fact that the door at the head of the jail had been left open by those in charge of the jail, you may not determine that said death was due to any breach of duty by defendant Robinson."

In the first place this instruction amounts to a comment on the evidence. It in effect tells the jury that the fact that the jail door was open is something that the jury may not take into account at all in determining whether Robinson breached any duty. Inasmuch as Robinson knew that Benally was intoxicated and unable to care for himself and knew that the booking area was a place of danger and knew that the door at the head of the stairs had been put there for safety reasons and that other

prisoners in an intoxicated condition prior to that time had fallen down the same stairs, the fact that the door was left open was a circumstance that the jury was entitled to consider in determining whether or not Robinson failed to exercise ordinary care to prevent Benally from injuring himself. The instruction also would lead the jury to believe that if the fact that the door was open had anything at all to do with Benally's death, that the jury should then find that Robinson had done no wrong.

In effect this instruction is similar to the one involved in *Hooper* v. *General Motors Corp.*, 123 U. 515, 260 P. 2d 549, where the jury was instructed that the fact that the rim and spider were found in a separated condition after the accident is no evidence of the fact that they were defective at the time of manufacture nor of the fact that the separating caused the truck to overturn. The Supreme Court reversed holding that the fact the spider and rim were separated was some evidence bearing on defect and on causation. So in the case at bar the instruction as given in effect removes completely from the jury's consideration the fact that the door was open as having any bearing on Robinson's negligence. This, we think, was error.

The vice of the instruction lies in this. While it may not have been Robinson's duty ordinarily to see that the door was closed since that was the

responsibility of the people in charge of the jail, it definitely does not follow that Robinson, if he elected to release his prisoner, would not then have a duty as to the door. As long as Robinson had control of his prisoner it may be supposed that he did not have any duty as to the door, but once he is about to release him, ordinary care requires, knowing Benally's condition, that Robinson either shut the door before releasing Benally or that he take other measures to prevent him from injuring himself in this place of danger.

If the law of this state is what we believe it to be, that a police officer is liable for injury or death of a prisoner caused by his negligence, then clearly this instruction is wrong because the fact that the door was open is definitely a circumstance, along with all of the other circumstances, that the jury is entitled to take into account in determining whether or not Robinson, considering the knowledge he had of the condition of the jail and Benally's condition, exercised reasonable care for the safety of his prisoner.

The mere fact that Edmunds and Duncan also had a duty to keep the door shut, would not relieve Robinson of his duty to exercise reasonable care for the safety of the prisoner.

As the Supreme Court of Nevada said in *Alec Novak & Sons* v. *Hoppin*, 359 P. 2d 390 (Nev. 1962),

> "Before negligence can be actionable, that is to say before it can be charged against a party to a lawsuit, such negligence must be a proximate cause of the damage complained of. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element or circumstance, or the conduct of any one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause."

So in this case it is plaintiffs' position that the negligence of all three defendants concurred and resulted in the death of Benally, and that plaintiffs are entitled to have their case submitted to a jury with instructions that correctly state the law.

It should be noted that the trial court used the words "wrongful performance of duty" in its instructions. Instruction No. 21 (R. 76), consistent with what we respectfully urge was the trial court's erroneous view of the law, in substance defines wrongful performance of duty as an intentional use of unnecessary force or the use of force in excess of that which an ordinary prudent person would have used. This instruction is clearly erroneous because it eliminates from the jury's consideration, the predicating of liability on the ground of negligence.

CONCLUSION

This court is urged to clearly announce the rule that a police officer is liable for the injury or death of a prisoner caused by negligence, whether that negligence be a misfeasance or a nonfeasance. Prejudicial error was committed in admitting the inquest testimony of Duncan and in giving the instructions discussed in Point III.

The judgment in favor of the defendants, Edmunds and Duncan, should be reversed and the case sent back for trial. The judgment in favor of the defendant, Robinson, should be reversed and a new trial ordered.

Respectfully submitted,

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